IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5661

HARRY D. IACONETTI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case.

OPINIONS BELOW

The judgment of the Court below was entered on August 4, 1976 (Appendix D, *infra*, p. 17a). A timely petition for rehearing en banc was denied on September 22, 1976 (Appendix E, *infra*, p. 27a). The judgment of conviction in the District Court was entered January 7, 1976, and the memorandum opinion and Order of the Trial Court denying Petitioner's motion for a new trial was entered January 8, 1976. (Appendices B and C, respectively, *infra*, pp. 4a, 6a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the rebuttal testimony of Goldman and Stern, partner of Respondent's chief witness, and attorney for Respondent's chief witness, respectively, was properly admissible and not violative of the Federal Rules of Evidence.

2. Whether the Trial Court's charge to the jury, including Counts 3 and 5 (Title 18, Section 1951, U.S.C.), which Counts were dismissed after the verdict, improperly influenced the jury's determinations on all five Counts, and violated Petitioner's due process rights.

3. Whether the introduction into evidence of the recordings and transcripts thereof, made February 11, 1975 and February 24, 1975, respectively, violated Petitioner's constitutional rights.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. Constitution of the United States, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

2. United States Code, Title 18, Section 201(c):

> Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for:
>
> (1) being influenced in his performance of any official act; or
>
> (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) being induced to do or omit to do any act in violation of his official duty; or . . . .

3. Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if —

> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the

penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

4. Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

5. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . .

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the

general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

STATEMENT OF THE CASE

Petitioner, a federal employee, employed by the General Services Administration, was arrested on February 24, 1975 and charged with bribery and extortion. He was released on his own recognizance that day, without bail.

On April 8, 1975, a five count indictment was returned against him (Appendix A, infra, p. 1a).

In brief summary, the first two counts deal with a firm known as Champion Envelope Manufacturing Company, It was alleged that (1) Petitioner "did . . . solicit" money and (2) that he "did accept and receive . . . approximately $3,000" to be influenced in the performance of his official acts. These counts were grounded upon Title 18, Section 201(c) U.S.C.

The third count, bottomed on Title 18, Section 1951 U.S.C., charged him with attempted extortion.

Counts 4 and 5 set forth similar activities with reference to a company known as Lightalarms Electronics Corporation — Count 4 was based upon bribery without a specific sum, and Count 5 was grounded in extortion.

All of the counts arose out of alleged transactions between Petitioner and the aforesaid companies — with Champion in February, 1975 and with Lightalarms in October, 1974.

Trial began before Judge Jack B. Weinstein on October 10, 1975, and was concluded on October 21, 1975.

Prior to submitting the case to the jury, the Court denied Petitioner's motion to compel Respondent to elect whether to proceed on Counts 1, 2, and 4 or on 3 and 5, respectively. Petitioner claimed that bribery and extortion were mutually exclusive.

On October 21, 1975, the jury rendered verdicts of guilty on all five counts. On January 7, 1976, Judge Weinstein sentenced Petitioner to a term of four years of imprisonment on Counts 1, 2, and 4, each to run concurrently. Counts 3 and 5, upon Petitioner's renewed motion, were dismissed.

Simultaneously, Petitioner's motion for a new trial on the grounds that certain evidence was improperly admitted in violation of the hearsay rule and for lack of evidence was likewise denied by the Trial Court.

Respondent's case on Counts 1, 2 and 3 was based mainly on the testimony of Champion's officers, Michael Lioi and Zenon Babiuk, with the questioned rebuttal testimony of Alan Goldman and Morris Stern.

Mr. Lou Sonner testified in support of Counts 4 and 5. Several exhibits were introduced into evidence and Respondent attempted to establish, in broad terms, the development and implementation of the alleged bribery and extortion acts by Petitioner.

The aforesaid two officers of Champion initially testified. The testimony of the latter did not include any direct threat for, request, demand, or necessity of payment to Petitioner. It merely attempted to show that Petitioner was not properly performing his duties.

Lioi's testimony — in direct conflict with that of the Petitioner — asserted demands for bribes on February 10, 1975 (no recording thereof exists), with a reiteration

therefor on February 11, 1975 — in Lioi's office with Lioi's own transcribing equipment. Thereafter, further conversations — on FBI recording equipment — were recorded between Lioi and Petitioner on February 24, 1975.

All of said conversations culminated in Lioi's allegedly placing a package containing $3,000. in the trunk of Petitioner's car, in front of Lioi's business premises, on February 24, 1975. Petitioner was thereupon arrested by FBI agents observing the scene.

Mr. Lou Sonner's testimony, hazy and uncertain as to any alleged demands in October, 1974, was based upon said Petitioner's threats to disapprove his company's government contracts unless certain payments were made.

Respondent also called a witness from the General Services Administration — not in Petitioner's department. Said witness indicated that, Petitioner, a quality assurance specialist, investigating potential government contractors, had final approval or disapproval of the issuance of a contract and the acceptance of the products produced pursuant to the contract. Petitioner's witness — also from the General Services Administration — testified to the contrary.

Petitioner took the stand and denied the criminal assertions made by Respondent's witnesses. He claimed that he was merely playacting with Lioi because Lioi had initially offered him a bribe on February 10, 1975, the date no recording was made.

Petitioner further testified that he did not need funds, and, therefore, no reason to request, to accept bribes, or to extort money existed; that his finances were in good order; and that his record of service with the government was excellent.

By virtue of the direct contradictions between the Respondent's witnesses and Petitioner, the Trial Court

permitted respondent to call, in its rebuttal case, Goldman, a business partner of Lioi, and Stern, the attorney for Lioi's company. The testimony of these two witnesses was admitted into evidence over the strenuous objections of Petitioner.

The testimony of the two rebuttal witnesses was offered to show that Lioi had expressed to them, on February 10, 1975, Petitioner's alleged demands. It is this latter testimony which Petitioner alleges is hearsay and inadmissible under the Federal Rules of Evidence.

Petitioner's defense was based upon his repeated denials of any breach of his official duties, his desire to perform his responsibilities efficiently and assist government contractors, and his effort to gather evidence re Lioi's proferred bribe, pursuant to an unofficial conversation among federal employees in his department.

REASONS FOR GRANTING THE WRIT

I.

THE REBUTTAL TESTIMONY OF RESPONDENT'S WITNESSES, GOLDMAN AND STERN, WAS HEARSAY AND WAS ADMITTED INTO EVIDENCE IN ERROR.

The testimony of Goldman and Stern detailed the conversations each had with Respondent's chief witness, Lioi. It covered Lioi's out of court declarations — which allegedly repeated Petitioner's demands and statements of February 10, 1975. This testimony was offered for the truth of the matter asserted therein, and in fact, constitutes hearsay under Rules 801, et seq., Federal Rules of Evidence.

The basic definition of hearsay under Rule 801(c) notes that it "is a statement other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Despite Petitioner's strenuous objection, the Trial Court held that these statements were not hearsay under Rule 801(d)(1)(B) and Rule 801(d)(2)(C). Further, that even if the statements were in fact inadmissible hearsay, they were admissible under Rule 803(24).

The Trial Court held the statements to be probative and relevant. It is not denied that they were offered for the truth of the matters asserted therein.

An examination of the aforesaid Rules reveals their inapplicability herein and that such testimony is hearsay and inadmissible under Rule 802.

It is also to be noted that the preamble to the Federal Rules of Evidence states, in pertinent part, that the new Rules, effective July 1, 1975, should not be applied to work "injustice". Clearly, these innovative changes, as used by the Trial Court — especially Rule 803(24) — worked a gross injustice upon Petitioner.

At the very end of the trial, the admission of this rebuttal testimony clearly surprised Petitioner. Unfortunately, there is a paucity of case law interpreting these sections. It can hardly be said that Petitioner was not surprised and had, in effect, as required, adequate notice to prepare therefor despite the Trial Court's early remarks relative thereto.

A. The Trial Court's suggestions and statements alluding thereto, in the first instance, substantially prejudiced Petitioner.

The Trial Court initially raised the matter of rebuttal evidence, without any suggestion or demand from Respondent. Lioi testified at the trial, and was subject to cross-examination concerning the February 10, 1975 meeting with Petitioner. The testimony of Goldman and

Stern, as to Lioi's prior statements, was consistent with Lioi's testimony at the trial. However, Lioi's prior statements were not offered to rebut a charge of recent fabrication and improper influence or motive.

In *United States v. Potash*, 118 F.2d 54, 57, it was held that the mere fact that Petitioner's counsel had cast aspersions upon the accuracy of the witnesses' memory and veracity of his testimony did not amount to attack based on recent fabrication. Thus, the Court held that a written statement offered by Respondent had been properly excluded as there was no charge of recent fabrication.

Here, there was no attempt to impeach Lioi by offering Lioi's own inconsistent statements as to the February 10th meeting or as showing that he had a bad reputation. In fact, Petitioner introduced no evidence of Lioi's hostility or bias. The precondition of impeachment was not met by Respondent, and the exception to the hearsay rule does not apply.

Further, despite the fact that Petitioner's testimony alleged a different version of what was said between them on February 10th, Petitioner did not claim that Lioi had changed his testimony.

It must be noted that what constitutes an attack based on recent fabrication has been judicially considered.

In *United States v. Zito*, 467 F.2d 1401, the defense counsel's persistent inquiries during cross-examination reflected an intensive interest in the witness' prior crimes, suggesting to the jury that his testimony was a fabrication for the purpose of obtaining clemency. No such inquiries or suggestions were present here.

Further, the mere fact that Petitioner's testimony is in conflict with that of Respondent's key witness is not per se a charge of recent fabrication. It cannot be asserted that a mere denial by a defendant of his guilt, or that he uttered

certain words, constitute an attack based upon recent fabrication.

In *United States v. Dorfman*, 470 F.2d 246, the Court of Appeals, Second Circuit, held that prior consistent statements must be made prior to the events upon which the alleged improper motive was based.

An examination of Petitioner's testimony — as to his conversation with Lioi on February 10th — reveals that it was Lioi who first offered money to Petitioner. Any motive Lioi had to lie or fabricate a story necessarily arose at the time of that conversation. Lioi's statements to Goldman and Stern were made after this conversation.

Even under Rule 801(d)(2)(C), the rebuttal testimony is not admissible as non-hearsay.

The Trial Court impliedly found that Petitioner, requesting a bribe from Lioi, authorized him to act as his agent. Thus, Lioi's statements are admissible against him as vicarious admissions.

Clearly, this portion of the Rule does not apply to the relationship between an alleged criminal and his agent, as it was never intended to cover a "criminal agency" situation. It is hornbook law that cases dealing with statements made by agents and vicarious admissions deal mainly with commercial agencies. An "agent" who aids a criminal in furthering the crime is truly a co-conspirator.

The Trial Court's opinion (Appendix C, *infra*, p. 6a) predicates the admission of the rebuttal testimony on relevancy, on exceptions to the hearsay rule and as "reliable and necessary hearsay".

The rebuttal evidence may be relevant, but its unfair prejudice cannot be discounted. The Trial Court has permitted rank hearsay to sail under the guise of relevancy. Its unfairness and inequity greatly outweighs the rule of relevancy. Anything may be relevant, but that does not

make it proper. Here, the protection of Petitioner's rights is paramount.

Further, the Trial Court determined that Petitioner had actually requested a bribe and thus authorized Lioi to confer with his partners. Thus, the Trial Court acted as a trier of fact.

This "guilty" finding cannot establish the requisite agency under Rule 801(d)(2)(C). It destroys the presumption of innocence and actually usurps the jury's power.

To contend that Petitioner made Lioi his agent stretches the understanding of the term and strains credulity. Assuming arguendo, that there was an agency, Lioi was not authorized to make the statements. Lioi conferred with Goldman and Stern on his own initiative.

Nor is the rebuttal testimony admissible as an exception to the hearsay rule under Rule 803(24).

Clearly, this statutory exception does not afford unlimited use. In any event, it must be carefully restricted in criminal cases.

Here, the hearsay statements specifically charged Petitioner, and were used to buttress the testimony of Respondent's key witness. Thus, the use of Goldman and Stern's testimony was highly prejudicial to Petitioner.

In *United States v. Bennett*, 409 F.2d 888, the Court of Appeals, Second Circuit, criticized "the excessive use of hearsay".

Finally, although the Trial Court's memorandum opinion notes that Petitioner did receive timely notice, Rule 803(24) was clearly violated because timely notice was not received. Therefore, the testimony may not be admitted under this exception because the proponent had not made it known to Petitioner sufficiently in advance of the trial or hearing to provide him with a fair opportunity to meet it. Further, not only is the intention to offer the testimony

necessary, but the particulars of it and the names and addresses are to be made known.

An examination of the advisory notes concerning this Rule, reveals that its inclusion was grounded on the safety factor of the notice provision which should be strictly construed.

Petitioner was not advised of Respondent's intention to introduce the testimony of these men until October 17th — a Friday — only two days before the same was offered on Monday, October 20th.

The Rule further provides that any hearsay admitted must have "circumstantial guaranties of trustworthiness". Here, the statements do not offer requisite guaranties of trustworthiness.

Lastly, the Rule provides that the Court must determine that the interests of justice will best be served by the introduction of the statement into evidence. In preserving the interests of justice, the rights of Petitioner may not be lightly discarded; they were severely prejudiced by the introduction of the hearsay statements.

Nor can it be claimed that the evidence adduced by the testimony of Goldman and Stern was irrelevant. It was vital to Respondent's case and necessary to bolster its chief witness.

Here, the testimony of Goldman and Stern was crucial, devastating, and essential. Their rebuttal evidence was a necessary element to Respondent's case.

The rebuttal evidence was erroneously admitted and violated Petitioner's rights.

II.

THE TRIAL COURT'S CHARGE TO THE JURY WHICH INCLUDED THE THREE BRIBERY COUNTS AND TWO EXTORTION COUNTS WAS PREJUDICIAL TO PETITIONER.

The Trial Court's charge to the jury included all three counts of bribery and two of extortion. This constituted gross prejudice to Petitioner. Such harm was demonstrated when the Court's own motion dismissed the extortion charges after the jury's verdict.

It is clear that the Trial Court, throughout the entire trial, was troubled by the relationship between the bribery and extortion counts as charged. Since the crimes of bribery and extortion involve minor differentiating requirements, charging the essentially same crimes was not only confusing but misleading.

It is clear that if the jury found Petitioner guilty on the bribery counts, it had no true alternative but to find him guilty on the extortion charges. It is impossible to determine which counts the jury considered initially and whichever counts were first considered, there was no choice but to find subsequent guilty verdicts. Clearly, if the two extortion counts were dismissed initially, there may have been no bribery convictions of Petitioner.

Therefore, by permitting the trial to proceed on all five counts, the Trial Court committed prejudicial error. This error is substantially harmful and prejudicial and necessitates a reversal of the conviction on the bribery counts.

III.

THE ADMISSION INTO EVIDENCE OF THE TWO TAPED CONVERSATIONS — FEBRUARY 11, 1975 AND FEBRUARY 24, 1975 — AND THE TRANSCRIPTS THEREOF — VIOLATED PETITIONER'S RIGHTS.

Prior to trial, Petitioner's motion to suppress this taped evidence was denied and was continually denied at the trial each time it was renewed.

The tape of February 11, 1975 was recorded by Lioi on his own recording device and is of a conversation between himself and Petitioner. The tapes of February 24, 1975 were conversations between Lioi and Petitioner, made on an FBI recording device secreted on Lioi.

The use of this electronic eavesdropping and the subsequent use of the evidence obtained therefrom was prejudicial to Petitioner.

An examination of two pertinent cases in this Court warrants attention.

In *On Lee v. United States*, 343 U.S. 747, an agent of Respondent had actually transmitted two conversations he had with the defendant to other Government agents. It was held that the Government agent had not committed a trespass in the tort sense and that the other Government agents could testify to what was heard. The Court did not address itself to the issue of consent and this case turned solely on the issue of trespass.

In *Katz v. United States*, 389 U.S. 347, Government agents, without the defendant's consent, overheard and recorded his end of a conversation by attaching a listening to the outside of a telephone booth. Here, the trespass theory enunciated in *On Lee, supra*, was discarded. However, this Court noted that, regardless of the presence

or the absence of the tort feature, the Government's activities in electronically listening and recording defendant's words violated his rights.

The denial of Petitioner's motions to exclude the tapes was reversible error. A motion, if involving constitutional rights of a defendant, can never be made late.

Here, Lioi, using his own tape recorder initially, adroitly taped the conversation of February 11, 1975 and not the conversation of February 10 where Petitioner claimed Lioi had offered him a bribe. Petitioner is a person aggrieved thereby, and the failure to suppress the tapes and transcripts was highly prejudicial to his rights.

CONCLUSION

For the reasons advanced in this petition, Petitioner prays that this Court issue the writ of certiorari to review the decision of the Court of Appeals below. Petitioner respectfully submits that the errors that occurred in the trial of this case are sufficiently clear and fundamental to warrant summary reversal of the conviction.

Respectfully submitted,

LEON DICKER
Attorney for Petitioner

APPENDIX A

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 75 CR 277
(Title 18, U.S.C. §201(c) and Title 18, U.S.C. §1951)

UNITED STATES OF AMERICA

-against

HARRY DOMINICK IACONETTI,

Defendant.

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of February, 1975 and the 11th day of February, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly ask and solicit from Champion Envelope Manufacturing Company, Inc. approximately Nine Thousand Five Hundred Dollars ($9500.) for himself in return for the defendant HARRY DOMINICK IACONNETTI'S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT TWO

On or about the 24th day of February, 1975, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly accept and receive from Champion Envelope Manufacturing Company, Inc. approximately Three Thousand Dollars ($3000.) for himself in return for the defendant HARRY DOMINICK IACONETTI'S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT THREE

From on or about the 10th day of February, 1975 up to and including the 24th day of February, 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI did unlawfully, wilfully and knowingly attempt to obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempting extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that the defendant HARRY DOMINICK IACONETTI attempted to obtain a sum of money not due him or his office from and with the consent of Champion Envelope Manufacturing Company, Inc., such consent to be induced under color of official right and by fear of economic loss. (Title 18, United States Code, Section 1951)

COUNT FOUR

On or about and between the 15th day of October, 1974 and the 1st day of December, 1974, both dates being

approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI, being a public official as defined in Section 201(a), Title 18, United States Code, did knowingly, wilfully, unlawfully, directly and corruptly ask and solicit from Lightalarms Electronics Corporation, a sum of money for himself in return for the defendant HARRY DOMINICK IACONETTI"S being influenced in the performance of his official acts. (Title 18, United States Code, Section 201(c))

COUNT FIVE

On or about and between the 15th day of October, 1974 and the 1st day of December, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant HARRY DOMINICK IACONETTI did unlawfully, wilfully and knowingly attempt to obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempting extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that the defendant HARRY DOMINICK IACONETTI attempted to obtain a sum of money not due him or his office from and with the consent of Lightalarms Electronics Corporation, such consent to be induced under color of official right and by fear of economic loss. (Title 18, United States Code, Section 1951).

A TRUE BILL
FOREMAN.

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

APPENDIX B

JUDGMENT OF CONVICTION OF DEFENDANT

UNITED STATES DISTRICT COURT FOR
THE EASTEN DISTRICT OF NEW YORK

No. 75 CR 277

UNITED STATES OF AMERICA

vs.

HARRY DOMINICK IACONETTI

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 1/7/1976 with counsel Leon Dicker, Esq.

There being a finding/verdict of Guilty, counts 1 to 5 incl.

Defendant has been convicted as charged of the offenses of violating T-18, U.S.C.Secs. 201(c) T-18, U.S.C. Sec. 1951, in that from on or about and between Oct. 15, 1974 up to and including Feb. 24, 1975, both dates being approximate and inclusive, the defendant, did knowingly, wilfully, unlawfully, and knowingly attempt to obstruct, delay and affect commerce and the movement of articles by attempting extortion in that the defendant attempted to obtain a sum of money not due him or his office, being a public official, as defined in Sec. 201(a).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 4 years on each of counts 1, 2 and 4 to run concurrently. Stay of execution of sentence granted pending appeal.

* * * *

s/Jack B. Weinstein

Date: January 7, 1976

APPENDIX C

MEMORANDUM OPINION OF TRIAL COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 CR 277

UNITED STATES,

Plaintiff.

-against-

HARRY DOMINICK IACONETTI,

Defendant.

APPEARANCES:

HONORABLE DAVID G. TRAGER, United States Attorney, Eastern District of New York — By: RAYMOND J. DEARIE, Esq., Assistant United States Attorney
For Government

LEON DICKER, Esq., 400 Madison Avenue, New York, New York
For Defendant

WEINSTEIN, D. J.

The defendant, Harry D. Iaconetti, a federal government contract inspector, was found guilty by a jury of soliciting and accepting a bribe (18 U.S.C. §201(c) and attempting to extort money (18 U.S.C. §1951) from two government suppliers. He moves for a new trial on the

ground that the verdict rested upon inadmissible rebuttal evidence by two government witnesses. For the reasons stated below, the court finds the evidence relevant, non-prejudicial and admissible under the hearsay rules.

I. Facts

The government's chief witness against the defendant was Mr. Lioi, an officer in a corporation seeking a government contract. Mr. Lioi testified that on February 10, 1975, the defendant told him that it would be "hard to justify" a favorable pre-award survey, a prerequisite to the awarding of a contract, unless 1% of the contract price were paid to the defendant and "upper echelons" in the government. After the defendant requested the bribe, Mr. Lioi discussed it with his partners and counsel for the corporation, contacted the FBI, and arranged for future conversations with the defendant to be secretly recorded. As a result, a significant portion of the government's case consisted of tapes of the conversations between Mr. Lioi and the defendant on February 11 and 24, of 1975.

To rebut the government's case, the defendant relied primarily on his own testimony. He denied each government witness' version of their unrecorded conversations with him. Furthermore, he testified that instead of requesting a bribe from Mr. Lioi on February 10, he was offered an unsolicited bribe of $1,000 by Mr. Lioi despite his repeated assurances that the contract would be awarded to the firm. He explained the tapes as recordings of conversations in which he was "leading . . . on" Mr. Lioi in order to "gather evidence".

One other explanation by the defendant of his conduct was revealed on his cross-examination by the government. Immediately after his arrest, with the money in his possession, the defendant had told the FBI that the bribery

discussions with Mr. Lioi had been a joke. The defendant testified as follows?

> "Q In fact, you told the FBI, Mr. Iaconetti, that the entire unfortunate incident was a practical joke, didn't you?
>
> A I said it started out like a practical joke.
>
> Q You didn't tell the FBI that the whole matter was a practical joke and that you had a reputation for being a practical joker, and this was one of your practical jokes that got out of hand? Isn't that what you told the —
>
> A Yes, I said that to [Special Agent] Chandler I believe."

Because of the conflicting interpretations that could be given portions of the tapes, because understanding the taped discussions depends in part on what happened at the February 10th meeting, and because the defendant flatly contradicted Mr. Lioi's version of the meeting on the 10th, the government presented two rebuttal witnesses. The witnesses related Mr. Lioi's reports to them on the 10th of the defendant's statements earlier that day, thus substantiating Mr. Lioi's testimony that the defendant had solicited a bribe. The witnesses were Mr. Goldman, a business partner of Mr. Lioi, and Mr. Stern, the attorney for the firm.

Mr. Stern testified on direct examination as follows:

> "Mr. Lioi said that an individual from GSA had been in the factory that day and that the individual had been there for purposes of doing a pre-award survey with regard to a contract that [the firm] had bid on.
>
> This individual had at one point in the day asked him directly for money. I believe the amount was $12,000 [approximately 1% of the contract]. And that that money was to feather the bed and give [the firm] that contract. . . . He also said that the man offered him a deal with regard to future contracts."

Defendant made a timely objection to the testimony of these two witnesses; the ground stated was that the testimony was prejudicial inadmissible hearsay. Federal Rules of Evidence, Rule 103(a)(1).

II. Relevancy

Rules 401 to 403 of the Federal Rules of Evidence require that evidence be relevant and that its relevance not be outweighed by unfair prejudice. Rule 401 defines relevant evidence as tending to affect the probability of a proposition of fact a party must establish. It reads:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The testimony of the two rebuttal witnesses meets the relevancy test of Rule 401. It is highly probative of a material fact in the case, that is, that the defendant solicited a bribe from Mr. Lioi on February 10th, as charged in the indictment. Evidence that Mr. Lioi contacted a business partner and the attorney for the corporation shortly after his meeting with the defendant makes it more probable that something of consequence to the business occurred during the meeting with the defendant. It would be imperative to consult with a business partner after any discussion of a bribe in order to determine how to meet what might be a business crisis. The evidence showed that loss of this contract would have adversely affected the company. Once it was decided to resist, the corporation counsel's advice would be necessary in deciding how to act.

The testimony of these two witnesses as to the content of Mr. Lioi's communication with then also had an important bearing on the jury's evaluation of witnesses' credibility. The rebuttal evidence makes it more likely that Mr. Lioi's version of the February 10th meeting with the defendant was accurate rather than the defendant's testimony that Mr. Lioi was actively seeking to bribe him. Confirmatory evidence is relevant since it aids the jury in evaluating the probative force of other evidence offered to prove a material fact. Mr. Lioi's testimony was crucial with respect to not only the events of the 10th, but also those of the days intervening to the defendant's arrest on the 24th. It set the framework for the tape recorded conversations and helped to explain the tone of those conversations. Thus, the rebuttal evidence is relevant as directly probative of a material fact and as a reinforcement of the credibility of a key witness.

Despite the fact that the evidence is relevant, it may be excluded in the trial court's discretion of its negative, prejudicial, consequences outweigh the probative value. As Rule 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

None of the factors listed in Rule 403 overbalances the probative force of the evidence. The prejudicial effect of the evidence was not significant. The jury had already heard that the defendant had solicited a bribe on February 10th. The emotional impact of hearing two brief confirmations of the solicitation was negligible. Furthermore, since the rebuttal testimony was restricted, by direction of the court, to repetition of the defendant's statements to Mr. Lioi, as

related by Mr. Lioi to the witnesses, there was no confusion, delay, or waste of time.

III. Hearsay

Goldman's and Stern's testimony would traditionally have been characterized as hearsay. They repeated the extra judicial declarations of Lioi relating what the defendant said to prove what defendant said. This is hearsay under Rules 801(a)(b) and (c) of the Federal Rules of Evidence reading:

> "Rule 801 Definitions
>
> The following definitions apply under this article:
>
> (a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant. A 'declarant' is a person who makes a statement.
>
> (c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Exceptions to this rule provide three independent routes by which the rebuttal witnesses' reports of Mr. Lioi's out of court statements to them may be admitted as evidence in chief.

A. Consistent testimony to rebut charge of fabrication.

Under Rule 801(d)(1)(B) prior consistent statements of a witness testifying and subject to cross-examination concerning his statements are not hearsay when offered under certain circumstances to support credibility. It reads:

> "(d) Statements which are not hearsay. A

> statement is not hearsay if — (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ."

The rebuttal evidence meets the three conditions of Rule 801(d)(1)(B). First, the declarant, Mr. Lioi, testified at the trial and was subject to cross-examination about the February 10th meeting. Second, Mr. Goldman's and Mr. Stern's testimony was consistent with Mr. Lioi's testimony about the defendant's solicitation of a bribe. Third, the evidence rebutted an implied charge of improper motive. The defendant's account of his February 10th conversation with Mr. Lioi contradicted Mr. Lioi's account both in matters of major importance and in details. The total variance between the two accounts of the February 10th conversation is sufficient to constitute an implied claim by the defendant that Mr. Lioi lied because of improper motive. The defendant also expressly suggested on the witness stand that Mr. Lioi fabricated the idea of the defendant's seeking a bribe for the improper motive of covering up the fact that Mr. Lioi himself had attempted to bribe the defendant.

B. Admission of defendant

The evidence may be considered an admission by the defendant under an agency theory and therefore admissible under Rule 801(d)(2)(C):

> "(d) Statements which are not hearsay. A statement is not hearsay if . . . (2) Admission by party-opponent. The statement is offered against a

> party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject. . . . "

From the other evidence in the case, including the transcripts of February 11 and 24, the court finds, as a predicate for admissibility pursuant to Rule 104(a), that the defendant requested a bribe from Mr. Lioi on February 10th and authorized him to confer with his associates in order to get their permission to pay that bribe. He was fully aware of the organization of the business and knew that Mr. Lioi could not make the large payment demanded without the permission of his business associates. To demand a bribe was, therefore, to authorize those who ran the business to discuss the demand. Mr. Lioi's repetition of the defendant's solicitation is, as a result, an authorized statement, an admission by a party.

C. Reliable and necessary hearsay

The Federal Rules of Evidence codify an open-ended exception for reliable and necessary hearsay. Its use requires careful exercise of judicial discretion and the satisfaction of precise criteria. It reads:

> "Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

> procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> "However, a statement may not be admitted under this exception uniess the proponent of it makes known to the adverse party sufficiently in advance ot the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

The first requirement of Rule 803(24) is that there be "circumstantial guarantees of trustworthiness" equivalent to those for the enumerated hearsay exceptions. The declarant was available for cross-examination. The fact that the statement was made close on the heels of the criminal event and to persons with whom it was appropriate and even necessary to communicate would seem to mitigate the risks of insincerity and faulty memory. The quality of the facts cited as insuring reliability for the first twenty-three hearsay exceptions range over an entire spectrum. The factors present here are certainly equivalent in reliability to those of many of the other exceptions and superior to some. We prefer not to rest on the state of mind exception, Rule 803(3), even though *United States v. Annunziato*, 293 F.2d 373, *cert. denied*, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed. 2d 134 (1961), in circumstances much like those before us, admitted hearsay on that theory. That case probably went beyond the limits of Rule 803(3) by allowing "a statement of memory or belief to prove the fact remembered or believed." *Shepard v. United States*, 290 U.S. 96, 106, 54 S.Ct. 22, 26, 78 L.Ed. 196, 203 (1933); *United States v. Kennedy*, 291 F.2d 457, 459 (2d Cir. 1961).

The second requirement of the Rule is that the

"statement [was] offered as evidence of a material fact." Rule 803(24)(A). This requirement seems redundant since, if it did not tend to prove or disprove a material fact, the evidence would not be relevant and would not be admissible under Rules 401 and 402. What is probably meant is that the exception should not be used for trivial or collateral matters. The discussion of the probative value of the evidence for the purpose of meeting the requirements of Rule 401 makes it clear that the evidence is relevant to a material proposition of fact in the case and is of great importance.

Rule 803(24)(B) requires that the "statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." The testimony of the two rebuttal witnesses is the most powerful evidence of what was said in view of the straight conflict between the chief witness for the prosecution, Mr. Lioi, and the defendant, with respect to what happened on the critical date of February 10th. Furthermore, the testimony not only casts light on what was said, but also on how it was said. This is important because of the statement of the defendant to the FBI that the bribery discussion was all a joke. Thus, the meaning of the words used by the defendant on February 10, the critical date, depends to a considerable extent on body motions and whether defendant was laughing or winking, whether his tone of voice would give color and meaning to words which otherwise would be neutral. Even the words, "I don't want to take a bribe and will not take one," said with a wink and a smile might well be interpreted to mean exactly the opposite. Evidence of Mr. Lioi's response to the February 10th conversation is in the final analysis the best available to resolve doubt about what actually occurred between the defendant and Mr. Lioi.

In addition, "the general purposes of these rules and the interests of justice will best be served by admission of the

statement into evidence." Federal Rules of Evidence, Rule 803(24)(C). There is a clear conflict of credibility. The jury was entitled to all the help available on the point.

Finally, the government gave the defendant ample notice of the intention to offer the statement. Notice was given midway through the defendant's testimony, five days before the rebuttal witnesses were called. Defendant did not request a continuance or make any reference to an inability to adequately prepare to meet the testimony of the new witnesses. Although notice was not given in advance of trial, as required by the language of the Rule, allowance must be made for situations like this in which the need did not become apparent until after the trial had commenced. Since it was not the proponent's fault that notice could only be given after the trial began, and since the defendant was not prejudiced by the mid-trial notice, the evidence was properly admitted under Rule 803(24).

IV. Presentation on Rebuttal

The court has broad powers to control the mode and order of interrogating witnesses. Federal Rules of Evidence, Rule 611(a). Presentation on rebuttal, after the defendant had testified, rather than as part of the government's direct case, was appropriate and desirable.

V. Conclusion

The rebuttal evidence was properly admitted. It was necessary so "that the truth may be ascertained and proceedings justly determined," as required by the fundamental rule of interpretation of the Federal Rules of Evidence, Rule 102.

The motion for a new trial is denied.

SO ORDERED.

Dated: Brooklyn, New York
January 8, 1976

U.S.D.J.

APPENDIX D

OPINION ON APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 974—September Term, 1975
Argued April 27, 1976 Decided August 4, 1976
Docket No. 76-1034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY D. IACONETTI,

Defendant-Appellant.

Before:

LUMBARD, WATERMAN and FEINBERG, *Circuit Judges*

Appeal by Harry D. Iaconetti from a judgment of conviction for having solicited and received a bribe, in violation of 18 U.S.C. §201(c), entered in the United States District Court for the Eastern District of New York after a jury trial before the Honorable Jack B. Weinstein, District Judge.

Affirmed.

David G. Trager, United States Attorney, Eastern District of New York, Brooklyn, N.Y. (Raymond J. Dearie, Assistant United States Attorney, of Counsel), *for Plaintiff-Appellee.*

Leon Dicker, New York, N.Y., *for Defendant-Appellant.*

WATERMAN, *Circuit Judge:*

This is an appeal from a judgment of conviction entered in the Eastern District of New York after a jury trial before Judge Jack B. Weinstein. Appellant was convicted of having solicited and received a bribe in violation of 18 U.S.C. §201(c).[1]

The indictment comprised five counts, charging Iaconetti with bribe solicitation and receipt, and with attempted extortion under color of official right and by fear of economic loss, in connection with his duties as Quality Assurance Specialist for the General Services Administration ("GSA"). In this position, appellant acted primarily as an inspector, supervising the preparation and administration of contracts between GSA and private contractors who were to provide various goods and services to the federal government. The jury returned guilty verdicts on all five counts, but prior to the imposition of sentence the trial judge, for reasons set out below, dismissed the extortion counts without prejudice.

The Government proved to the satisfaction of the jury that one such private contractor, Lightalarms Electronics Corporation of Brooklyn, New York, was awarded a government contract in October, 1974, and Iaconetti was assigned to supervise that contract. There was evidence that appellant, during contract discussions with a Lou Sonner of Lightalarms, warned him that he would need a payment from Sonner of 1% of the estimated value of the contract price in order to insure that no problems would develop during the life of the contract. Sonner, fearful that failure to pay the requested sum, particularly in view of Iaconetti's statement that he would be sharing the payment with a superior in the GSA, would jeopardize all of Lightalarms' government work, discussed the matter with

his partners. Iaconetti repeated these overtures several times, but no payment was ever made by Lightalarms, Iaconetti having been reassigned to a plant in New Jersey and having had no further contact with Lightalarms.

In February, 1975, Iaconetti was assigned to conduct a pre-award survey of Champion Envelope Manufacturing Company so as to assess whether Champion was capable of performing a contract which the company had successfully bid upon. Iaconetti met with Michael Lioi, President of Champion, and after indicating to him during two preliminary meetings that he had some doubt about Champion's ability fully to perform the contract, Iaconetti intimated that if Lioi would be willing to pay 1% of the contract price to him, he would assure favorable treatment for Champion by the upper echelon of GSA. This February 10 meeting ended with Lioi stating that he would have to speak with his associates.

Lioi did immediately contact his business partners Babiuk and Goldman, and later that evening, his attorney, Stern. The following morning, February 11, Lioi telephoned the FBI. On an agent's advice, Lioi recorded on his own equipment his conversation with Iaconetti later that day. During that session, Lioi agreed to pay a total of $9800 to Iaconetti and to make an advance payment of $1000. Several days later, arrangements were made for Lioi and Iaconetti to meet for the payment. By this time, FBI agents had equipped Lioi with a miniature recorder and transmitter. On the afternoon of February 24, 1975, Lioi met Iaconetti as previously arranged. Appellant directed Lioi to place the $1000 in the trunk of the government vehicle Iaconetti was driving. As he closed the trunk, appellant was arrested by FBI agents. The tapes of the recorded conversations of February 11 and 24 were introduced at trial.

Iaconetti took the stand and attempted to rebut the

Government's allegations and proof by contending that in fact it was Lioi who had told Iaconetti that he wished to pay him $1000 to insure Champion's receiving the GSA contract. Appellant admitted at trial, however, that after his arrest he had told FBI agents an entirely different story—that in fact the entire matter with Lioi was merely a practical joke.

After conviction, Iaconetti moved for a new trial on the ground that certain of the testimony of Lioi's associate Goldman and of attorney Stern was prejudicial hearsay and thus was improperly admitted into evidence. The Government's chief witness at trial was Lioi. On cross-examination, defense counsel sought to impeach his credibility by suggesting that he in fact had initiated the scheme to pay the bribe. Iaconetti took the stand and attempted to discredit Lioi's testimony further. He testified that he scheduled the meetings after February 10 with Lioi so that he might trap Lioi, the real villain, into incriminating himself. The Government then put Stern and Goldman on the stand in rebuttal to corroborate Lioi's account of the transactions. They related Lioi's reports to them on February 10 of the statements Lioi said Iaconetti had made earlier that day; and specifically, they recounted Lioi's report to them of the money Iaconetti had requested.

Judge Weinstein denied the post-trial motion. He held that the statements either were not hearsay under Rule 801(d)(1)(B)[2] and Rule 801(d)(2)(C)[3] of the new Federal Rules of Evidence, or were properly admissible under an exception[4] to the hearsay rule embodied in Rule 803(24), F.R. of Evid.[5]

Appellant now reasserts this claim of error in support of his argument for reversal and a new trial. We agree with Judge Weinstein that Stern's testimony was properly admitted under Rule 803(24), the residual hearsay exception, and that Goldman's testimony was admissible

under Rule 803(24) and Rule 801(d)(2)(C). Thus concluding that the statements were properly admissible into evidence under recognized exceptions to the hearsay rule, we need not reach the additional question of whether the testimony might correctly be characterized as non-hearsay under Rule 801(d)(1)(B), the alternate basis for admissibility advanced below.

Rule 801(d)(2)(C) provides that a statement is not hearsay when it is offered against a party and was made by someone authorized by that party to make a statement concerning the subject involved. Judge Weinstein held that the statements made by Lioi to Stern and Goldman could be considered admissions by Iaconetti under this exception on the theory that by requesting a bribe from Lioi, appellant impliedly authorized Lioi to confer with his associates in order to get their permission to pay the bribe. The court below explained that by demanding the bribe Iaconetti necessarily authorized the persons who ran the business to discuss his demand among themselves. While this theory of an implied authorization might justify the admission of Goldman's statements as he was Lioi's business partner and thus would necessarily be consulted prior to Champion's payment of the requested sum to Iaconetti, the same cannot be said of Stern, Lioi's attorney. His approval would presumably not be necessary, and thus it cannot be reasonably assumed that Iaconetti would have impliedly authorized Lioi's speaking to counsel regarding the bribe.

The second basis for admissibility, Rule 803(24), provides that hearsay statements not otherwise included within any specific exception may be admitted if they have equivalent circumstantial guarantees of trustworthiness and if, in addition, they meet four specified criteria. If "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

procure through reasonable efforts; and (C) the general purposes of [the] rules and the interests of justice will best be served by admission of the statement into evidence," the hearsay may be admitted provided that the "proponent of it makes known to the adverse party sufficiently in advance of the trial . . . to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

The court below held, and we agree, that the statements in question possessed sufficient indicia of reliability, and were the best evidence available to corroborate Lioi's account of the February 10 meeting. Moreover, the statements were relevant to a material proposition of fact in the case and they served to clarify what actually was said and intended by both Lioi and Iaconetti at that meeting. Of course the defendant was not given notice, prior to trial, of the Government's intention to offer the rebuttal testimony and was not notified until the Friday before the statements were offered and admitted on Monday, October 20, 1975. While strict compliance with the rule is thus lacking, we agree with Judge Weinstein that the defendant was given sufficient notice here, and that some latitude must be permitted in situations like this in which the need does not become apparent until after the trial has commenced.[6] The fact that defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony further militates against a finding that he was prejudiced by it. Thus, we conclude that the rebuttal testimony of Stern and Goldman was properly admitted.

Appellant's remaining points require no extended discussion. His contention that the tapes of the conversations of February 11 and 24 between Iaconetti and Lioi were inadmissible is ill-founded, for the tapes were

made with Lioi's knowledge and were constitutionally seized, *United States v. White*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427 (1963). His next claim, that the trial judge improperly instructed the jury on the elements of extortion, is also without merit. Iaconetti was charged in the indictment with bribe solicitation and receipt, and with extortion. Judge Weinstein found, and we agree, that there was enough evidence of both crimes to submit both of them to the jury. Prior to sentencing Iaconetti, the Judge on his own motion dismissed the extortion counts because he determined that appellant could not be convicted of more than one offense for doing essentially the same act. There was no error in that, nor in the judge's instructions to the jury. Finally, wholly without merit is appellant's unique claim that because his own testimony absolutely proved that he committed no crime, there was insufficient evidence in the case to sustain the verdict. To the contrary, the Government's evidence overwhelmingly confirmed his guilt.

Affirmed.

FOOTNOTES

1. §201. Bribery of public officials and witnesses.

*****

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty;

*****

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

2. Rule 801. Definitions.

(*d*) *Statements which are not hearsay.*—A statement is not hearsay if—

(1) *Prior statement by witness.*—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

3. Rule 801. Definitions.

(*d*) *Statements which are not hearsay.*—A statement is not hearsay if—

(2) *Admission by party-opponent.*—The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject. . . .

4. At the time the statements were admitted at trial over defendant's objection, Judge Weinstein advanced a fourth alternative basis for their admissibility based on *United States v. Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). In his memorandum and order denying Iaconetti's motion for a new trial, the Judge declined to rest his decision on this ground. 406 F.Supp. 554 (E.D.N.Y. 1976)

5. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

*****

(*24*) *Other exceptions.*—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

6. Our holding should in no way be construed as in general approving the waiver of Rule 803(24)'s notice requirements. Pre-trial notice should clearly be given if at all possible, and only in those situations where requiring pre-trial notice is wholly impracticable, as here, should flexibility be accorded. The legislative history makes clear the importance of the notice requirement. The Supreme Court draft of this residual exception merely provided for the admissibility of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." F.R. of

Evid., Rule 803(24) (Sup. Ct. Draft 1972). The exception was wholly deleted by the House Judiciary Committee. *See* H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 5-6 (1973). The Senate Judiciary Committee reinstated the provision, *see* S. Rep. No. 93-1277, 93d Cong., 2d Sess. 18-20 (1974), and added all of the present qualifications except the notice requirement, which the Conference Committee inserted, presumably as a compromise measure. *See* H.R. Rep. No. 93-1597, 93d Cong., 2d Sess. 11-12 (1974).

APPENDIX "E"

ORDER DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of September, one thousand nine hundred and seventy-six.

Present:

HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
HON. WILFRED FEINBERG
Circuit Judges.

Docket No. 76-1034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY D. IACONETTI,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Harry D. Iaconetti,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

No. 76-566

In the Supreme Court of the United States

OCTOBER TERM, 1976

HARRY D. IACONETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-566

HARRY D. IACONETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-26a) is reported at 540 F. 2d 574. The opinion of the district court (Pet. App. 6a-16a) is reported at 406 F. Supp. 554.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1976, and a petition for rehearing was denied on September 22, 1976. The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in admitting certain rebuttal testimony into evidence.

2. Whether the district court erred in submitting the counts charging petitioner with bribery and extortion to the jury.

3. Whether petitioner's Fourth Amendment rights were violated by the admission into evidence of tape recordings that were made with the consent of a party to the conversations.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of soliciting and accepting a bribe, in violation of 18 U.S.C. 201(c).[1] He was sentenced to a concurrent term of four years' imprisonment on each count. The court of appeals affirmed (Pet. App. 17a-26a).

1. The facts adduced at trial are contained in the opinions of the district court (Pet. App. 7a-9a) and the court of appeals (Pet. App. 18a-20a). Insofar as relevant to the petition, they show that in February 1975 petitioner, a Quality Assurance Specialist employed by the General Services Administration (G.S.A), was assigned to conduct a pre-award survey of the Champion Envelope Manufacturing Company to ascertain whether the company was capable of performing a contract upon which it had successfully bid. On February 10, 1975, petitioner met with Michael Lioi, president of the company, and suggested that if Lioi were willing to pay him one percent of the contract price he would assure favorable treatment for the company by G.S.A. Lioi informed petitioner that he would have to discuss the matter with his business partners, Zenon Babiuk and Alan Goldman. That same day Lioi conferred with his partners and their attorney, Morris Stern; he thereafter contacted the

[1]Petitioner also was found guilty on two counts of extortion, in violation of 18 U.S.C. 1951, but the district court dismissed those counts prior to sentencing.

Federal Bureau of Investigation and was advised to record any subsequent conversations with petitioner. On February 11, using his own tape recorder, and on February 24, using a tape recorder supplied by the F.B.I., Lioi recorded conversations with petitioner during which the two men made arrangements for payment of the requested bribe. On February 24, 1975, Lioi met with petitioner as previously arranged and gave him the money. Petitioner was then arrested by F.B.I. agents who had observed the transaction (Pet. App. 19a).

2. At trial, Lioi related the circumstances of his meetings with petitioner and described the negotiations for and the details of the bribe solicitation. To corroborate this testimony, the tapes of the February 11 and February 24 conversations between Lioi and petitioner were introduced into evidence. In an attempt to discredit Lioi's testimony, petitioner testified that it was Lioi who had suggested the bribe. Under cross-examination, however, petitioner admitted that after his arrest he had told F.B.I. agents an entirely different story, namely, that the whole episode with Lioi had been a practical joke (Pet. App. 20a). To rebut petitioner's claims, the government then called Stern and Goldman, who testified that, at their meeting with Lioi on February 10, 1975, Lioi had reported petitioner's bribe offer to them (Pet. App. 8a-9a).

Following his conviction, petitioner moved for a new trial on the ground that the testimony of Stern and Goldman was inadmissible hearsay. The district court denied the motion, holding that the testimony was either not hearsay because introduced to rebut a charge of recent fabrication (Fed. R. Evid. 801(d)(1)(B)) or, if hearsay, was admissible under a number of exceptions to the hearsay rule (Pet. App. 11a-16a). The court of appeals affirmed. It reasoned that "by demanding the bribe [petitioner]

necessarily authorized the persons who ran the business to discuss his demand among themselves" (Pet. App. 21a). Accordingly, the court concluded that the testimony of Goldman, Lioi's business partner, concerning what Lioi had told him about his conversation with petitioner on February 10, was properly admitted under Rule 801(d)(2)(C) of the Federal Rules of Evidence, which provides that "[a] statement is not hearsay if * * * [it] is offered against a party and is [made] by a person authorized by [that party] to make a statement concerning the subject [involved]" (see Pet. App. 21a). Stern's rebuttal testimony, the court held, also was properly admitted under Rule 803(24), the residual hearsay exception, since the testimony "possessed sufficient indicia of reliability," was "the best evidence available to corroborate Lioi's account of the February 10 meeting," was "relevant to a material proposition of fact," and "served to clarify what actually was said and intended by both Lioi and [petitioner] at that meeting" (Pet. App. 22a).

ARGUMENT.

1. Petitioner's principal claim (Pet. 8-13) is that the rebuttal testimony of Goldman and Stern was inadmissible hearsay. This contention is fully answered by the opinions of the court of appeals and the district court, on which we rely. Contrary to petitioner's assertions (Pet. 12), the trial judge did not usurp the province of the jury in determining that petitioner impliedly authorized Lioi to discuss the bribe with his partners, since questions of admissibility of evidence are for the court, even if factual determinations are involved. Similarly, there is no merit to petitioner's claim (Pet. 12-13) that he failed to receive adequate notice under Rule 803(24) that the government intended to offer the rebuttal testimony of Goldman and Stern. While it is true that petitioner was not notified prior to trial,

the need for the testimony did not become apparent until after petitioner had contradicted Lioi's version of the February 10 meeting. The court of appeals correctly concluded that, in these circumstances, some latitude must be permitted under the notice provisions of the rule (Pet. App. 22a). Accord, *United States* v. *Carlson*, C.A. 8, No. 76-1363, decided December 17, 1976, slip op. 11-12. This is especially true since petitioner was not prejudiced by the lack of notice. Although petitioner was informed of the government's intention to offer the rebuttal testimony three days in advance of its introduction, he never requested a continuance or claimed at any time that he was unprepared to meet the testimony (Pet. App. 22a).

Finally, although petitioner concedes the relevance of the rebuttal testimony, he contends that "its unfair prejudice cannot be discounted" (Pet. 11). However, the trial judge carefully weighed any possible prejudicial effect of the testimony against its conceded probative value and correctly concluded (Pet. App. 10a-11a):

> The prejudicial effect of the evidence was not significant. The jury had already heard that the [petitioner] had solicited a bribe on February 10th. The emotional impact of hearing two brief confirmations of the solicitation was negligible. Furthermore, since the rebuttal testimony was restricted, by direction of the court, to repetition of the [petitioner's] statements to Mr. Lioi, as related by Mr. Lioi to the witnesses, there was no confusion, delay, or waste of time.

2. Petitioner contends (Pet. 14) that he was prejudiced by the district court's submission of the counts charging extortion and bribery to the jury. Although petitioner asserts, without elaboration, that the multiple charges were "confusing [and] misleading," they were properly

joined in the indictment and, as the court of appeals correctly held (Pet. App. 23a), "there was enough evidence of both crimes to submit both of them to the jury." Any prejudice to petitioner was eliminated by the district court's dismissal of the extortion counts prior to sentencing.

3. Petitioner's final contention (Pet. 15-16) that the tape recordings of his conversations with Lioi were improperly admitted into evidence is frivolous, since the tapes were made with the knowledge and consent of Lioi. See *United States* v. *White*, 401 U.S. 745; 18 U.S.C. 2511 (2)(c) and (d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01